COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

SUFFOLK, SS. APPEALS COURT NO. 2017-P-1065

OXFORD GLOBAL RESOURCES, LLC

Plaintiff-Appellant

v.

JEREMY HERNANDEZ

Defendant-Appellee

ON APPEAL FROM A JUDGMENT ON MOTION TO DISMISS
OF THE SUPERIOR COURT

BRIEF OF THE PLAINTIFF-APPELLANT OXFORD GLOBAL RESOURCES, LLC

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CORPORATE DISCLOSURE STATEMENT

Oxford Global Resources, LLC is a wholly-owned subsidiary of On Assignment, Inc., a publicly held company, and no other corporation or publicly held company owns 10% or more of Oxford Global Resources, LLC's stock.

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2. Whether the restrictive covenants, the Massachusetts choice of law, and forum selection clauses and the waiver provision related thereto, to which Hernandez agreed, are procedurally and substantively unconscionable?

3. Whether the restrictive covenants to which Hernandez agreed are enforceable under Massachusetts and California law to protect Oxford Global Resources, LLC ("Oxford") against

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[1]The pertinent language is: "Employer and Employee agree that this Agreement will be governed by the laws of Massachusetts, without giving effect to the conflict of laws provision thereof. All suits, proceedings and other actions relating to, arising out of or in connection with the Agreement will be submitted to the in personam jurisdiction of the United States District Court for the District of Massachusetts ('Federal Court') or the courts of the Commonwealth, if the Federal Court lacks jurisdiction to hear the matter or if Oxford so chooses. Venue for all such suits, proceedings and other actions will be in Massachusetts. Employee hereby waives any claims against or objections to such in personam jurisdiction and venue." §6.3 (A113).

Hernandez's competitive use of Oxford's proprietary and confidential information, including the identity of Oxford's customers and its written customer lists?

4. Whether the Massachusetts forum selection clause at issue is unenforceable on the basis of California's public policy as stated in California Bus. & Prof. Code §16600? Addendum ("AD") 9.[2]

5. Whether Hernandez waived the right to seek dismissal based on forum non conveniens by agreeing to the Massachusetts forum selection clause in which he also expressly waived any objection to personal jurisdiction and venue in Massachusetts?

6. Whether the court made errors of law and acted arbitrarily in dismissing Oxford's case on the ground of forum non conveniens?

II. STATEMENT OF THE CASE

Nature of Case. The photographic images attached to the operative complaint (A130-134), the First

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[2] Section 16600 provides, "every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void."

Amended Complaint ("FAC") (A77-115), leave no doubt that Hernandez improperly retained and used Oxford's written client lists in the employ of MindSource, Inc. ("MindSource"), a direct competitor of Oxford's. The Protective Covenants Agreement ("Agreement" or "Restrictive Covenants")(A108-115) Hernandez signed in connection with his employment does not restrain him from competing with Oxford, but it does bar him from using Oxford's proprietary and confidential information in the process. Hernandez agreed that Massachusetts law governed both his employment relationship with Oxford and the Restrictive Covenants, and further, that Massachusetts would be the sole forum for resolving disputes. (A113). He agreed to personal jurisdiction and venue in Massachusetts and waived any objections to a Massachusetts forum. (Id.)

The lower court granted Hernandez's motion to dismiss on forum non conveniens grounds ("Decision")(AD1-8) ruling that the Agreement and the Massachusetts choice of law and forum selection clauses were void as contracts of adhesion.

The Decision (available online) creates a sea change in the enforcement of restrictive covenants in

employment agreements, and in particular with respect to employment placement firms like Oxford, where restrictive covenants protecting trade secrets and other confidential information against unfair competition serve vital and legitimate business interests, are common and have been repeatedly and substantially upheld in the Commonwealth and elsewhere. No case that Oxford is aware of has declared employee restrictive covenant agreements void and unenforceable as contracts of adhesion, as the lower court held here in striking the Agreement's choice of law and forum selection clauses that called for the application of Massachusetts law and exclusive Massachusetts venue. Indeed, it is impossible to reconcile the court's Decision with the many restrictive covenant decisions issued by the Massachusetts courts over the years.

The lower court made several errors of law requiring reversal and judgment entered in Oxford's favor as a matter of law. The Massachusetts choice of law, exclusive venue clauses and related waiver provision are enforceable against Hernandez under long-standing governing Massachusetts decisions. It is vital that this Court reverse and correct the legal

errors made by the lower court so as to eliminate the confusion and misapplication of law that infects the Decision with respect to the enforcement of restrictive covenants, choice of law and forum selection clauses in the Commonwealth.

Course of Proceedings. The FAC asserts four related claims. Count I alleges Hernandez breached the restrictive covenant provisions of the Agreement. ¶¶88-101 (A99-100). Count II alleges Hernandez also violated a covenant of good faith and fair dealing. ¶¶102-112 (A100-101). Count III alleges that Hernandez intentionally interfered with the contractual and advantageous relations between Oxford and its clients. ¶¶113-122 (A102-103). Finally, Count IV alleges that Hernandez unlawfully misappropriated Oxford's trade secrets and confidential information. (A103-104). Hernandez moved to dismiss the FAC on forum non conveniens grounds and submitted Defendant's affidavit in support. ("Affidavit") (A148-150; 165-166). The parties fully briefed Hernandez's motion (A.148-210), had oral argument (A211-233), and submitted supplemental letter briefs. (A242-270; 271-329).

Disposition of court below. In dismissing the action, the court first found that the Massachusetts

choice of law and forum selection clauses in the Agreement were unenforceable as contracts of adhesion because it was "apparent," in the court's view, that Hernandez had no opportunity or bargaining power to negotiate those terms notwithstanding representations in the Agreement that Hernandez had the opportunity to consult with counsel before signing. AD2-3.

The court invalidated the Massachusetts choice of law clause, stating that it was "apparent" that the clause was an attempt by Oxford to circumvent California's strong public policy against enforcing non-competition agreements. AD4. The court rejected Oxford's position that the Restrictive Covenants in this case did not violate California public policy since California law, like Massachusetts law, barred employees from using the former employer's trade secrets and confidential information, and specifically customer lists, to compete, as Hernandez did. AD4-5. The court relied on the aphorism that "remembered information" was not confidential, even though there was substantial evidence before the court, including photographic images, that Hernandez was improperly using Oxford's written customer lists in soliciting customers on behalf of his new employer. The court

nonetheless held that the restrictions Oxford was seeking to enforce went far beyond what is permitted under California law or Massachusetts law. AD5. The court concluded that the Massachusetts choice of law clause was unenforceable because it would result in "substantial injustice" to Hernandez by depriving him of the ability to compete against Oxford. Thus, the court concluded that California law governed the Agreement. AD5-6.

The court ruled that under California law the Massachusetts forum selection clause was unenforceable for the same reasons. AD5. Having invalidated the Massachusetts choice of law and forum selection clauses, the court turned to the issue of forum non conveniens. AD7-8. The court concluded that Hernandez would be unable adequately to defend himself unless the case was litigated in California and thus it would be unfair to require Hernandez to litigate in Massachusetts (consistent with his Agreement). Id. Notwithstanding that the court ruled that Oxford's Restrictive Covenants were void under California law, the court stated at the end of the Decision that its previous determination was irrelevant to the Hernandez's motion to dismiss on forum non conveniens

grounds, and observed that "[i]f California law applies and limits Oxford's claims, that will be true whether this matter is tried in California or Massachusetts courts." AD7. The court did not consider or discuss whether or the extent to which Hernandez waived any forum non conveniens issue by agreeing to a Massachusetts forum, nor did it address the provision in the forum selection clause Hernandez signed that he waived any claims against or objections to jurisdiction and venue in Massachusetts. (A113).

Statement of Facts. The FAC contains numerous detailed allegations outlining the nature of Oxford's business and the competitive nature thereof, its proprietary and confidential information and database, its employment and restrictive covenant agreements with its employees and Hernandez, and Hernandez's violation of those agreements through his use of Oxford's written customer lists. (A78-98). As noted, the photographic evidence attached to the FAC (A130-134) establishes Hernandez's gross and deliberate violations of the Agreement and his unfair competition with Oxford through the use of Oxford's confidential information. These numerous allegations and proof are effectively ignored by the court.

Oxford's Business

Briefly, Oxford is an international recruiting and staffing company specializing in fields such as information technology, healthcare information technology, software/hardware, regulatory, and engineering. ¶7 (A78). Oxford is headquartered and maintains its principal place of business in Beverly, Massachusetts. ¶10 (A79). It employs more than 650 full time employees in twenty-four (24) offices in the United States and Europe. Id.

At issue here is Oxford's information technology staffing and consulting business, which, among other things, provides computer hardware and software development, operational support, Internet and web development, e-business, wireless and network communications, and other information technology and computer-related staffing and consulting services. The information technology staffing and consulting industry is highly competitive and specialized. ¶20-21 (A82).

Oxford's Information Technology Business segment, among other things, (a) identifies and recruits highly-skilled and qualified information technology consultants with the expertise to meet client

information technology needs, and (b) assigns and places consultants to provide information technology services directly to clients. Consultants generally work "on site" with clients. ¶22 (A82).

Oxford expends substantial time and resources in developing the knowledge and information required to understand what clients and their client managers need and when, as well as finding the appropriate consultants to service clients' needs. Such information generates goodwill with Oxford's customers and is critical to Oxford's success. ¶¶9, 15, 21-23, 26 (A79-84).

Oxford's Database

Oxford organizes and stores its proprietary information such as its trade secrets, marketing strategies, client lists and contact information, hiring practices of individual client managers, consultant lists and contact information, relationships and goodwill, client hard files, lead sheets, client notes, client contracts, President Club lists (identifying top performing account managers and other significant Oxford performers), client business cards, job listing forms, and related materials and data, in a confidential and proprietary database

("Database"). ¶27 (A84-85). Oxford limits access to the Database and provides passwords only to authorized employees. ¶32 (A86). Oxford requires employees to sign restrictive covenant agreements. ¶33 (A86).

The Oxford Process

Hernandez was employed as an account manager. ¶36 (A87). As part of Hernandez's duties, he was provided access to the Database. Account managers such as Hernandez supervise relationships with clients and their client managers and oversee the placement of and services provided by consultants. ¶¶ 24-25 (A83).

In addition to Oxford's substantial investment in its relationships with clients, client managers, and consultants, Oxford established an operations model well known in the staffing industry as the "Oxford Process" ("Oxford Process"). ¶15 (A80). The Oxford Process is comprised of, among other things, in-person training, on-line training, role-playing, daily and quarterly meetings, and off-site training, management, and development meetings and seminars. There are significant costs and expenditures, both monetary and in terms of staffing, associated with implementing the Oxford Process. The specifics of this operations

model, which Oxford implements rigorously, are confidential, proprietary, and not publicly known. Id.

Oxford invests in account managers to identify, establish, cultivate, and maintain relationships with its clients, client managers, and consultants, and efficiently and effectively satisfy their respective needs. ¶¶14-15 (A80-81). Generally, account managers are responsible for maintaining and monitoring Oxford's relationships with clients and client managers and identifying potential new clients, client managers, and consultants and negotiating rates and finalizing placement of consultants with clients through client managers. ¶24 (A83).

Oxford spends substantial time and money in training account managers. It administers personal, intensive, and ongoing training to account managers for them to gain knowledge and expertise in of Oxford's unique techniques of client, client manager, and consultant relations, marketing to and solicitation of potential consultants, presentations of candidates to client employers and client managers, and cultivating and maintaining relationships with existing clients, client managers, and consultants. ¶¶15-16 (A80-81).

Hernandez's Employment and the Agreement

Hernandez's employment with Oxford is governed by an Offer Letter dated May 30, 2013 and the Agreement, both of which were executed by Hernandez. (A108-122). The importance of Oxford's Confidential Information is front and center in the Agreement. Hernandez agreed that "protecting and safeguarding" Oxford's "Confidential Information" was essential to the Company's business, agreed not to use or disclose Confidential Information except to carry out his duties, and agreed to return all Company property and documents and other media containing Confidential Information in his possession, custody or control when his employment ended. §§1.4-1.5(A109). Hernandez also signed a Code of Business Conduct and Ethics in which, among other things, he acknowledged and confirmed his confidentiality obligations and his obligation not to divert corporate opportunities from Oxford to himself or a third party. ¶53 (A92).

"Confidential Information" is defined, in relevant part, in Section 1.3 of the Agreement (A88, 108) as:

> . . . any and all information, whether or not meeting the legal definition of a trade secret, concerning: (a) the Company's

> business plans, strategic plans, forecasts, budgets, sales, projections and costs; (b) the Company's personnel and payroll records and employee lists; (c) candidates and Consultant/Contractors, including lists, resumes, preferences, transaction histories, rates and related information; (d) the Company's customers and prospective customers, including their identity, special needs, job orders, preferences, transaction histories, contracts, characteristics, agreements and prices; (e) marketing activities, plans, promotions, operations, and research and development; (f) business operations, internal structures and financial affairs; (g) systems and procedures; (h) pricing structure; (i) proposed services and products; (j) contracts with other parties; (k) Oracle customer identification numbers; (l) solutions to Company's customer's technical problems; and (m) Company customer history and technical information.

Section 1.3 of the Agreement further clarifies that:

> For avoidance of doubt, Confidential Information includes, without limitation, the names and contact information of any person or entity with whom or about whom Employee learned as a result of Employee's employment with Company and, upon termination, Employee agrees to delete any and all such information in every form . . . and keep no copies of same and provide sufficient evidence to Company that same has been deleted.

Hernandez's Agreement did not prohibit him from directly competing with Oxford following his employment. Hernandez was prohibited, however, from using Oxford's protected Confidential Information to

compete with Oxford. Specifically, Section 2.2 of the Agreement (A90, 110) states, in relevant part:

> Employee agrees that, during the term of Employee's employment with the Company, and for a period of twelve (12) months following the termination of Employee's employment, Employee will not directly or indirectly:
> . . .
>
> (b) use the Company's trade secret information including, without limitation, the identity of the Company's candidates or prospective candidates, to (i) solicit or seek to place any temporary employee or independent contractor candidate for or on behalf of any entity engaged in or seeking to be engaged in the Company's Business, or (ii) persuade, induce or attempt to persuade or induce any such person to leave his/her temporary employment or to refrain from providing services to the Company or its customers; or
>
> (c) use the Company's trade secret information including, without limitation, the identity of the Company's customers or prospective customers, the identities of their employees, contactors and consultants, special needs, job orders, preferences, transaction histories, contacts, characteristics, agreements and prices, to (i) solicit or seek to provide services to any customer for or on behalf of any entity engaged in or seeking to be engaged in the Company's Business, or (ii) persuade, induce or attempt to persuade or induce any such entity to alter or reduce its use of services from the Company.

Hernandez's Unfair Competition

On or about March 29, 2016, Hernandez terminated his employment with Oxford to join MindSource. ¶¶59-60 (A93-94). By letter dated April 11, 2016, Oxford

reminded Hernandez of his continuing obligations under the Agreement. ¶64 (A94). Hernandez violated the Agreement by using Oxford's Confidential Information to compete at MindSource. ¶¶65-87 (A94-99). In November 2016, Oxford received an anonymous memorandum with attached images. ¶¶69-73 (A95-96, 130-134). The memorandum, which was addressed to the CFO of MindSource and CEO of Oxford, stated:

> Mr. Jeremy Hernandez retained proprietary information including call lists, manager names etc. from when he worked at Oxford International. Most companies prohibit employees from such actions.
>
> While in the employ of MindSource, Mr. Hernandez brought into the office, and used the confidential information that he obtained from his employment at Oxford. I was told that many firms make employees sign that they will not tolerate the use of such confidential information.
>
> Please see the enclosed documentation showing his possession of confidential information, and use of that information at MindSource.
>
> MindSource was made aware of this issue over a week ago. MindSource is knowing [sic] allowing Mr. Hernandez to use proprietary information from Oxford and to call on accounts and people he met and supported while an Oxford employee.

Accompanying the memorandum were images depicting Oxford Manager Lead Sheets, a legal pad, MindSource

documents including a MindSource Reference Check form, and an email message from Hernandez. ¶¶71-72 (A96, 130-134). The Manager Lead Sheets are confidential Oxford forms that are part of the Oxford Database. They are used by account managers like Hernandez to track client and client manager leads and related marketplace information secured by the account manager or provided by other Oxford sources. (Id.)

The Manager Lead Sheets are in Hernandez's handwriting, identify certain Oxford Client and Client Manager contacts and prospects of Hernandez while employed by Oxford, and in some images these sheets appear next to MindSource forms. ¶72 (A96). There is also an image of a typed electronic solicitation message from Hernandez to one of his former Oxford client managers, as follows:

> Hi XXX,
> I have recently moved on from Oxford Global Resources. It has been a great 3 years, but I have found a new home with MindSource, Inc., which is a Solutions Provider for staffing. MindSource is similar to Oxford but has a lot more opportunity when it comes to working with clients. It would be great if we could discuss in the next…

¶73 (A96). Oxford's investigation, including its review of Hernandez's LinkedIn messages, detailed in the FAC (¶¶74-86 (A97-99)), indicates that following

his departure from Oxford, Hernandez used and disclosed Oxford's Confidential Information maintained in the Database to solicit Oxford's customers (including clients, client managers, and/or consultants), and thereby directly competed with Oxford on his own behalf and on behalf of MindSource in violation of the Agreement.

III. SUMMARY OF ARGUMENT

The lower court's ruling that the Agreement and choice of law and forum selection clause therein are void as contracts of adhesion is an error of law. The Agreement is not a contract of adhesion and is enforceable absent a showing that the terms are unconscionable. (pp. 20-26). The court failed to undertake or make findings that the Agreement or terms are unconscionable, and there is no basis to conclude that they are either procedurally or substantively unconscionable. There was no unfair surprise or oppression in requiring Hernandez to execute the Restrictive Covenants to preserve Oxford's proprietary and confidential business information. The court engaged in arbitrary and inappropriate fact-finding not supported in the record. (pp. 26-28)

The Agreement's restrictive covenants and Oxford's claims are enforceable under California and Massachusetts law. (pp. 29-33). The Agreement does not restrict Hernandez from competing with Oxford, rather it restricts him from using Oxford's trade secrets and Confidential Information when competing. These restrictions are enforceable under California and Massachusetts law. The court did not address Oxford's case law support and its cases are wholly distinguishable from the case on appeal. Hernandez used Oxford written customer lists, not "remembered information." (pp. 33-42)

The court's analysis of forum non convenience in this case is arbitrary and rests of several errors of law. Hernandez did not sustain his heavy burden to demonstrate he would effectively be deprived of his day in court if this case proceeds in Massachusetts, as he agreed. (pp. 42-46). Hernandez waived any objection to venue both by his agreement to exclusive Massachusetts venue and by expressly waiving in the Agreement any objections to Massachusetts venue. (pp. 45-46). There is nothing unfair or unreasonable in requiring Hernandez to respond in a Massachusetts forum according to the Agreement. (pp. 46-49).

IV. ARGUMENT

A. The lower court erred as a matter of law in ruling that the Massachusetts choice of law and forum selection clauses in the Agreement are void as contracts of adhesion.

The lower court invalidated the Massachusetts choice of law and forum selection clauses as contracts of adhesion. The court concluded that Hernandez lacked the opportunity or bargaining power to negotiate whether California or Massachusetts law would govern the restrictive covenants. AD3. In so concluding, the court engaged in speculative fact-finding and ignored the controlling law. Even assuming that the Agreement is a contract of adhesion, which it is not,[3] "contracts [of adhesion] are enforceable unless they are unconscionable, offend public policy, or are shown to be unfair in the particular circumstances." McInnes v.

[3] The Agreement is not the typical contract of adhesion in the consumer context. Section 187 of the Restatement (Second) of Conflict of Laws, cited by the court (AD3), makes clear that typically a contract of adhesion is a preprinted form with extremely small print, such as tickets and insurance policies. Section 187 itself confirms that even in consumer adhesion contracts, choice of law provisions are enforced. Section 187 does note that a choice of law provision will not be enforced if to do so would result in "substantial injustice." There is no substantial injustice to Hernandez in applying Massachusetts law; indeed, as demonstrated above, with respect to protection of employer confidential information such as the customer lists at issue here Massachusetts law is the same as California law.

LPL Financial LLC, 466 Mass. 256, 266 (2013) citing Miller v. Cotter, 448 Mass. 671 (2007). See also Minassian v. Ogden Suffolk Downs Inc., 400 Mass. 490 (1987); Ajemian v. Yahoo, 83 Mass. App. Ct. 565, 573-74 (2013); Bekele v. Lyft, Inc., 199 F. Supp. 3d 284 (D. Mass. 2016). The court did not consider whether, and made no finding that, the Restrictive Covenants or the Massachusetts choice of law and forum selection provisions were unconscionable under the governing standards. The court's per se ruling based on contracts of adhesion, and its failure to undertake the required unconscionability analysis, constitute reversible errors of law.

1. **The court's arbitrary fact-finding.** The court's conclusion that Hernandez lacked the ability to negotiate the Agreement is speculative and conclusory fact-finding without any supporting subsidiary facts proffered by Hernandez or reasonable inferences drawn from the FAC.

The court's reasoning is that Oxford alleged in the FAC that it would not have hired Hernandez without his execution of the Agreement, suggesting that this allegation "makes clear that Hernandez had no opportunity to negotiate these [the choice of law and

forum selection] issues." AD3. The court also found that Oxford did not proffer any evidence that there were any negotiations, thus imposing the burden on Oxford instead of Hernandez. AD3. The court's findings are speculative and arbitrary and place Oxford in a Catch 22 scenario.

In executing the Agreement, Hernandez acknowledged and agreed in §7.5 (i) that he had the opportunity to read (and that he understood), each provision of the Agreement, (ii) that he had the opportunity to review the Agreement with legal counsel, (iii) that he did not sign under duress, and (iv) that he was not relying on any representations or promises not in the Agreement. (A113). The court sweeps these contract provisions aside as "boilerplate," (AD3) but does not point to any evidence supporting the inference that Hernandez lacked the opportunity or bargaining power to negotiate over the choice of law and forum provisions. Hernandez's supporting Affidavit (A165-166) neither contradicts his acknowledgements in §7.5, nor suggests that he did not read or understand the Agreement, that he lacked the opportunity to review the Agreement with

counsel or was in any material way mislead or coerced into signing the Agreement.

The court's reliance on the FAC's allegation that Hernandez would not have been hired had he not signed the Agreement is misplaced, and, as noted, puts Oxford in a Catch 22 for two reasons. First, to warrant legal protection, it is incumbent upon Oxford to establish that its business information is confidential and proprietary. This requires, among other precautions ensuring secrecy, that Oxford put its employees on notice and gain their agreement through restrictive covenants not to improperly use Oxford's confidential and proprietary business information. See, e.g., Jet Spray Cooler, Inc. v. Crampton, 361 Mass. 835, 840-842 (1972) (emphasizing requirement for protection of confidential business information that all reasonable steps be taken to ensure secrecy including an active course of conduct designed to inform employees that such information is to be treated as confidential).

Given the nature of its business and proprietary information, Oxford would be hard pressed to assert it had undertaken reasonable efforts to ensure the confidentiality of its business information without written covenants and agreements restraining its

employees. Indeed, in hiring Hernandez Oxford required him to affirm in the Agreement that he was not under any existing restrictive agreements, thus reinforcing the importance of its restrictive covenants. That Hernandez checked the box affirming no such restraints necessarily establishes his knowledge of the importance of restrictive covenants to Oxford.[4] (A115).

Second, that Oxford would not have hired Hernandez without restrictive covenants establishes the legal consideration required to enforce the restrictive covenants. In short, the court's reasoning effectively turns Oxford's compliance with the law on its head to support the unreasonable inference that there was no opportunity for negotiations over the numerous terms of the Agreement, let alone the choice of law and forum selection clauses, had Hernandez's actually cared to seek changes.

2. **The court misapplied the law.** Even assuming Hernandez lacked the ability to negotiate, which Oxford disputes, it does not mean the Agreement is

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[4] Hernandez checking the box establishes that he read the Agreement. Notwithstanding, he would be bound to its terms even had he not read the Agreement. See Miller, supra 448 Mass. at 680 (failure to read or understand a contract provision does not free a party from its obligations).

unenforceable. As noted above, even contracts of adhesion are enforceable unless they are found to be unconscionable, violate public policy or are unfair. It is well established that business agreements such as employment agreements and restrictive covenants are not unenforceable simply because they are offered on a "take it or leave it" basis or there is inequality of bargaining power. Minassian supra 400 Mass. at 492; *Rosenberg v. Merrill Lynch Pierce, Fenner & Smith, Inc.*, 170 F.3d 1, 17 (1st Cir. 1999) (declining to hold that the arbitration agreement was unenforceable as a contract of adhesion); Deluca v. Bear Stearns & Co., Inc., 175 F.Sup.2d 102, 114-15 (D. Mass. 2001) (absent fraud or oppressive conduct, a pre-dispute arbitration agreement in the employment contract is not unenforceable); see also Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 33 (1991) (inequality in bargaining power between employer and hopeful employee is not sufficient reason to hold that arbitration agreements are never enforceable in the employment context).

Minassian, which involved an agreement exculpating Suffolk Downs of liability in advance, is instructive. The SJC ruled that although the agreement

was presented on a "take it or leave it" basis, leaving the plaintiff no choice but to sign it if he wished to race, it was enforceable regardless of whether the agreement was deemed a contract of adhesion. 400 Mass. at 492 (noting that in a business context there is far less reason to designate agreements as unconscionable than in the typical consumer transaction). Here, that Hernandez was required to agree to certain restrictive covenants as a condition of employment does not convert the Agreement and its Massachusetts choice of law and forum selection clauses into unforceable contracts of adhesion.

B. Hernandez's Agreement is not unconscionable.

Neither the restrictive covenants nor the choice of law and forum selection clauses in the Agreement are procedurally or substantively unconscionable, as a matter of law. This is a legal question for the court. Zapatha v. Dairy Mart, Inc., 381 Mass. 284, 293 (1980) (unconscionability issue is one of law for the court and the test is made as of the time the contract was made). Here, the court failed to apply the appropriate tests for unconscionability.

"The determination that a contract or term is or is not unconscionable is made in the light of its setting, purpose and effect." Machado v. System4 LLC, 471 Mass. 204, 218 (2015) citing Miller, supra 448 Mass. at 679. A plaintiff must show both procedural and substantive unconscionability; that is, that the circumstances surrounding the formation of the contract demonstrate unfair surprise and that the terms are oppressive. Machado, 471 Mass. at 218; Zapatha supra, 381 Mass. at 291; Bekele, 199 F. Supp. 3d at 299 citing Machado. Nothing in the Agreement, neither the restrictive covenants nor the choice of law and forum selection provisions, are obscurely worded or buried in fine print, nor were they proposed under circumstances suggesting unfairness. Hernandez never argued to the contrary below.

The restrictive covenants do not bar Hernandez from competing lawfully with Oxford; rather they bar Hernandez from using Oxford's confidential and proprietary information. There certainly can be nothing oppressive or unfair in requiring Hernandez to refrain from misappropriating Oxford's proprietary and confidential information, including customer related lists. The court's invalidation of the Massachusetts

choice of law and forum selection clauses was based on its erroneous view that the Restrictive Covenants were void under California law and not that the Restrictive Covenants were otherwise unconscionable and oppressive.

The court, however, did conclude that Oxford's Massachusetts' choice of law provision was an attempt to circumvent California's "strong policy" against enforcing non-competition agreements. In this the court unfairly thrusts on Oxford a nefarious motive without any evidence in the record. Oxford has offices in many states, and it is not unreasonable and certainly not underhanded or overreaching for Oxford to seek to apply in its employment agreement the law and forum of Massachusetts, its principal place of business. See W.R. Grace & Co. v. Hartford Accident and Indemnity Co., 407 Mass. 572, 586 (1990)("In the circumstances, we can say that, to obtain uniform and practical coverage nationwide for a multistate corporation such as Grace, it is desirable that the law of one State govern the interpretation of all Grace's comprehensive general liability insurance policies"). Moreover, as demonstrated below, California's "strong policy" against non-competition

agreements does not abrogate the Restrictive Covenants which bar the misappropriation of Oxford's confidential information.

C. The Agreement and Oxford's claims against Hernandez are enforceable equally under Massachusetts and California law.

The court's predicate for invalidating the Massachusetts choice of law and forum selection clauses is its stated belief that these clauses were an attempt by Oxford to circumvent §16600. (AD4). "Non-competition agreements like the one that Oxford required Hernandez to sign are not enforceable under California law." Id.

The Restrictive Covenants in the Agreement, measured against the well-established restrictive covenants law in Massachusetts, belie the notion that Massachusetts and California law are in conflict with respect to the enforceability of the Agreement and Oxford's claims. Under Massachusetts law, employee covenants not to compete are enforceable only to the extent that they are necessary to protect the legitimate business interests of the employer, including, trade secrets, other confidential information, or, the goodwill acquired through dealings with customers. Protection of the employer

from ordinary competition, however, is not a legitimate business interest, and a covenant not to compete designed solely for that purpose will not be enforced. See, e.g., Marine Contractors Co., Inc. v. Hurley, 365 Mass. 280, 287-88 (1974).

1. **The court failed to address numerous cases cited by Oxford establishing that Oxford's claims did not violate California law.**

The court disregarded numerous cases decided in Massachusetts and California cited by Oxford that demonstrate that Oxford's claims against Hernandez did not contravene or circumvent §16600. For example, Oxford noted that in Optos, Inc. v. Topcon Med. Sys., Inc., 777 F. Supp. 2d 217, 229 (D. Mass. 2011), the employee, like Hernandez, signed an employment agreement without a non-competition restrictive covenant, but with a Massachusetts choice of law provision. *Id.* at 225. The employee, like Hernandez, argued that California law governed. Id. at 229. The Optos court disagreed:

> Thus, "[t]he only restrictive covenants in the Agreement are the non-disclosure and non-solicitation provisions of the Agreement, which are significantly less restrictive than a non-compete agreement, and [the Court should] decline[] to treat them as the equivalent of a restraint on trade contemplated by [S]ection 16600 in the absence of …. a case where a court has found

> that California has a fundamental policy, as defined by Massachusetts choice-of-law rules, against mere non-disclosure or non-solicitation clauses."

Id. Section 16600 "invalidates provisions … prohibiting an employee from working for a competitor … unless they are necessary to protect the employer's trade secrets." Muggill v. Reuben H. Donnelley Corp., 62 Cal. 2d 239, 242 (1965); Optos, Inc., 777 F.Supp.2d at 229 (California's "policy does not extend to contractual clauses that are designed to protect an employer's trade secrets."); Aspect Software, Inc. v. Barnett, 787 F. Supp. 2d 118, 126 (D. Mass. 2011) (non-compete provision is not contrary to California policy where it "is clearly designed to protect [plaintiff's] trade secrets.").

Similarly, Oxford argued that the cases cited by Hernandez also supported its position. See, e.g., Ret. Grp. v. Galante, 176 Cal. App. 4th 1226, 1239 (2009) (acknowledging that "it is not the solicitation of the customers, but is instead the unfair competition or misuse of trade secret information, that may be enjoined."); Edwards v. Arthur Andersen LLP, 44 Cal. 4th 937, 946 n.4 (2008) (where court did not need to "address the applicability of the so-called trade

secret exception to [S]ection 16600…."); Application Grp., Inc. v. Hunter Grp., Inc., 61 Cal. App. 4th 881, 900 (1998) ("Section 16600 has specifically been held to invalidate employment contracts which prohibit an employee from working for a competitor when the employment has terminated, unless necessary to protect the employer's trade secrets."); Brack v. Omni Loan Co., 164 Cal. App. 4th 1312, 1324 (2008) (same); Cont'l Car-Na-Var Corp. v. Moseley, 24 Cal. 2d 104, 110 (1944) ("Equity will to the fullest extent protect the property rights of employers in their trade secrets and otherwise…."); Roll Sys., Inc. v. Shupe, 1998 WL 1785455, at *3 (D. Mass. Jan. 22, 1998) (acknowledging that validity of non-competition and non-solicitation agreement(s) under California law "depends on whether the clause prevents misappropriation of trade secrets."); Dowell v. Biosense Webster, Inc., 179 Cal. App. 4th 564, 577 (2009) (trade secret exception inapplicable to facts at issue); EMC Corp. v. Donatelli, 2009 WL 1663651, at *2 (Mass. Super. May 5, 2009) (enjoining employee where non-competition covenant is necessary to protect legitimate business interests, in light of employee's knowledge, by virtue of his position and

responsibilities, of employer's proprietary and trade secret information).

Except for a passing citation to Galante (AD5), the court ignored Oxford's cases. Instead, it rejected Oxford's positon ostensibly based on Oxford's definition of confidentiality information being overbroad because it included the identity of Oxford's customers. The court held that the Restrictive Covenants go far beyond what is permissible under California and Massachusetts law. (AD5). The court erred on both points.

2. The court disregarded the uncontested facts alleged that Hernandez improperly used Oxford's written customer lists.

First, as a factual matter, the court ignored Oxford's numerous and detailed allegations against Hernandez in the FAC, and attachments thereto. To be sure, this is not a case of Hernandez competing with Oxford on the basis of "remembered information" that does not constitute confidential information, as the court characterized the issue. (AD5). The concrete allegations in, and the images attached to, the FAC establish Hernandez's wrongful conduct: his actual possession and use of Oxford's written lists in soliciting Oxford's customers while competing with

Oxford. See Jet Spray, supra 361 Mass. at 840 (finding it significant that former employee took actual lists or papers belonging to the former employer).

3. **The cases relied on by the court to excuse Hernandez' conduct are not on point with the circumstances of this case.**

The cases cited by the court are completely distinguishable. AD5 citing American Window Cleaning Co. of Springfield, Massachusetts v. Cohen, 343 Mass. 195 (1961); Angell Elevator Lock Co. v. Manning, 348 Mass. 623, 625 (1965); Wooley's Laundry Inc. v. Silva, 304 Mass. 383 (1939); May v. Angoff, 272 Mass 317 (1930). Unlike here, these cases do not involve restrictive covenants or circumstances where the employee had taken and used customer lists. Equally significant, these cases were decided on the principle that the customer identities at issue were simply not confidential information.

For example, in American Window, which did not involve an agreement not to compete, there was insufficient evidence that the information used by plaintiff in soliciting customers was confidential. 343 Mass. at 199. "The information was of the kind which would be used by anyone working for his living in the window cleaning business." Id. at 200. In

Angell, 348 Mass. at 625, there was no finding that employee removed confidential list of customers or disclosed trade secrets and no employment agreement limiting right to work or to use his experience, knowledge or general skills. In May, 272 Mass. at 320, former employees distributing newspapers and periodicals for the employer were not under any agreement not to compete and returned books containing names of customers. There was no evidence that lists were copied or used. The employees had a right to use their knowledge of the trade and acquaintance with customers gained over their long employment.

Finally, in Wooley's Laundry, 304 Mass. at 386 & 390, the court noted that the defendant did not take a customer list (it was committed to memory) and that there was no confidential information as it was a matter of common knowledge that a business involving the delivery of merchandise or the collection of goods is not conducted in secret; therefore the employer's customers were discoverable by observation. Such is not the case here.

The court, however, did note (as reiterated by the SJC in Jet Spray) that it would not have been difficult for the employer to have imparted the

knowledge of his customers list under conditions that made it confidential. Jet Spray, 361 Mass. at 841 quoting Wooley's Laundry, 304 Mass. at 390-91. This emphasizes that even "remembered information" may be subject to protection as confidential information if the employer properly establishes the required predicates. Moreover, the SJC in Jet Spray made clear that simply because no list or paper was taken does not prevent the former employee from being enjoined if the information he gained through his employment and retained in his memory is confidential in nature. 361 Mass. at 840. Likewise, the SJC has ruled that regardless of the existence or nonexistence of a restrictive covenant, an employee has a duty not to use, in competition with the employer "written lists of names, or other similar confidential matters given to him only for the principal's use or acquired by the employee in violation of duty." New England Overall Co., Inc. v. Woltmann, 343 Mass. 69, 76 (1961) (citing Restatement 2d, Agency §296).

None of the circumstances in these cases are remotely comparable to the nature of Oxford's business and its proprietary and confidential information including the Database. This simply is not a case of a

former employee using general business knowledge gained through employment or "remembered information." The concrete evidence that Hernandez used Oxford's Manager Lead Sheets at MindSource confirms that this was not in any respect "remembered information." Nor is this a case where the identity of customers is not confidential because they are easily ascertained through observation or from public sources. As detailed in the FAC, the nature of Oxford's business, its Database and the protection and confidentiality of customer identities and other customer information imposed by Oxford clearly establish that Oxford has a legitimate proprietary interest in its customer lists and customer identities, among other things.

4. California case law clearly establishes that Oxford's claims against Hernandez do not violate §16600.

California law is even more pointed. The Galante case, supra, cited by the lower court, notes that California courts have repeatedly held that a former employee may be barred from soliciting existing customers to redirect their business if the employee is utilizing trade secret information, including customer lists. 176 Cal App. 4th at 1237-38. Numerous

courts have concluded that customer lists can qualify for trade secret protection. Id. at 1238.

> While courts are reluctant to protect customer lists to the extent they embody information . . . 'readily ascertainable' from public sources, such as business directories . . . where the employer has expended time and effort identifying customers with particular needs or characteristics, courts will prohibit former employees from using this information to capture a share of the market. Such lists are to be distinguished from mere identifies and locations of customers where anyone could easily identify the entities as potential customers.

Id. at 1238 citing Morlife Inc. v. Perry, 56 Cal.App.4th 1514, at 1521-1522 (emphasis added). The court in Galante found that, as Oxford did here, the employer spent substantial resources to develop its customer base and took precautions to ensure the confidentiality of its database. Id. at 1230.

In Morlife the court concluded that the customer list of a roofing service fell within the definition of a trade secret. Again, the court noted that where, as Oxford here, an employer has expended time and effort identifying customers with particular needs or characteristics a court will prohibit former employees from using this information to capture a share of the market. 56 Cal.App.4th at 1521. The Morlife court further noted that "to afford protection to the

employer, the information need not be in writing but may be in the employee's memory. Id. at 1522-23.

The court emphasized that "Morlife made reasonable efforts to maintain the secrecy of its customers' identity by limiting circulation of its customer lists and by advising its employees, through an employment agreement and an employee handbook, that Morlife considered the information valuable and confidential." Id. at 1521 & 1523.

Finally, Morlife noted that there was no legitimate basis for distinguishing a former employee who improperly uses customer information personally developed for the employer. Id. at 1526. A list of subscribers of a service, built up by ingenuity, time, labor and expense of the owner over a period of many years is property of the employer, a part of the good will of his business. Knowledge of such a list, acquired by an employee by reason of his employment, may not be used by the employee as his own property or to his employer's prejudice. Id.

Without gilding the lily, Oxford's confidential and proprietary information, as alleged in detail in the FAC, falls four-square within the analysis of the Galante and Morlife cases. FAC ¶¶9,15,21-23,26-27, 32-

33 (A79,80, 82, 94-86). Oxford expends substantial time and resources in developing the knowledge base of what its clients and client managers need and when, as well as locating appropriate consultants. Such information generates goodwill with Oxford's customers and is critical to Oxford's success. As noted, the Database stores Oxford's proprietary information including its marketing strategies, client lists and contact information, hiring practices, consultant lists and contact information, relationships and goodwill, client hard files, lead sheets, client notes, client contracts. Oxford limits access to the Database and provides passwords only to authorized employees. Oxford requires employees to sign restrictive covenant agreements. Indeed, this was the very act which the court relied on to find the Agreement was a contract of adhesion.

Moreover, Morlife confirms that Hernandez has no defense against the Restrictive Covenants based on any contention that he is free to solicit Oxford customers with whom he personally dealt. 56 Cal.App.4th at 1526. Oxford's proprietary interest in the identity and special characteristics of its customers is not abrogated by the fact that Hernandez, through the

Oxford Process and by virtue of the Database, may have cultivated a particular client relationship.

The court's analysis also ignores the effective severability language contained in §16600. The statute and caselaw make clear that a restrictive covenant that unlawfully restrains a former employee from engaging in a lawful profession, trade, or business "is to that extent void." See footnote 1 herein (emphasis added). See Application Grp. supra 61 Cal.App.4th at 902-903 (where provision would result in contravention of California public policy the provision will be ignored to the extent necessary to preserve public policy) (citing S.A. Empresa de Viacao Aerea Rio Grandense v. The Boeing Co., 641 F.2d 746, 749-50 (9th Cir. 1981)). As Oxford pointed out in its letter brief to the court, the California Legislature did not intend §16600 to void an entire contract. (A272) Thus, in both California and Massachusetts a court may essentially blue-pencil restrictive covenant provisions to the extent they fail to advance a legitimate business interest such as protection of business confidential and proprietary information.

What Galante and Morlife (and the others cited by Oxford to the court) establish is that, contrary to

the court's legal ruling, Oxford's claims are not barred under either California or Massachusetts law.

D. The Agreement's Massachusetts forum selection clause is enforceable and precludes dismissal based on forum non conveniens.

1. The court's analysis of forum non conveniens in this case is not sustainable.

The court's analysis of Hernandez' motion to dismiss based on forum non convenience is arbitrary and capricious and rests on several errors of law. After concluding that the Restrictive Covenants, Massachusetts choice of law and forum clauses are void under California law, the court undertakes an "Analysis of Proper Venue." (AD6). "In the absence of an enforceable forum selection clause, a plaintiff's decision to bring suit in a permissible venue should be respected unless an adequate alternative forum is available and the relevant private and public interests strongly favor litigating the case elsewhere." (Id.). The predicate for the court's forum non conveniens analysis then is its legal ruling that the Massachusetts forum selection clause (like the Massachusetts choice of law clause) is void under California law and therefore not "an enforceable forum selection clause." The court's determinations are

legal errors. Nonetheless, having spent six pages purportedly demonstrating that these clauses are void under California law, when the court arrives at the forum non conveniens analysis which requires "an adequate alternative forum" it does an about-face:

> State courts in California provide an adequate forum. They are just as capable of hearing this matter and deciding it fairly. Oxford does not contest this point. The choice-of-law issues discussed above have no bearing on whether this case should be tried in Massachusetts or California. Cf. Melia, 462 Mass. at 173-182. Thus the Court's determination that California law bars or at least limits Oxford's contract claims is irrelevant when deciding Hernandez' motion to dismiss on grounds of forum non-convenience. If California law applies and limits Oxford's claims, that will be true whether this matter is tried in California or Massachusetts courts.

(AD7)(emphasis added). Leaving aside the court's acknowledgment that Massachusetts courts are indeed capable of applying California law (if required), when confronted with a requirement that California must be an adequate forum, the court back-peddles on its legal rulings, suggests that California law may not bar but only limit Oxford's claims, and then declares his prior analysis and rulings are "irrelevant." The court simply cannot discard its prior legal rulings when required to evaluate whether the proposed forum would be adequate to address Oxford's claims. See

Gianocostas v. Interface Group-Massachusetts, Inc., 450 Mass. 715, 725 (2008) (first factor is whether the law of the alternate forum permits recovery for the plaintiff in the type of circumstances presented).

Massachusetts law provides for the enforcement of forum selection clauses "so long as they are fair and reasonable." Melia v. Zenhire, Inc., 462 Mass. 164, 182 (2012). For the forum selection clause to be unfair or unreasonable, Hernandez bears a "substantial burden" and must demonstrate that it will be so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court. See Cambridge Biotech Corp. v. Pastuer Sanofi Diagnostics, 433 Mass. 122, 133 (2000) citing The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 19 (1972); Boland v. George S. May Int'l Co., 81 Mass. App. Ct. 817, 820 (2012). There was no evidence proffered by Hernandez, nor a finding by the court, that Hernandez would be deprived of his day in court if this case proceeds in the Commonwealth. As the Massachusetts forum selection clause is valid and binding, by its terms it precludes Hernandez from seeking to dismiss this case on forum non conveniens grounds.

2. Hernandez waived any right to contest the Massachusetts forum to which he agreed.

In the first instance, "'[w]hen parties agree to a forum-selection clause, they waive the right to challenge the preselected forum as inconvenient or less convenient for themselves or their witnesses, or for their pursuit of the litigation." Kurra v. Synergy Computer Sols., Inc., 2016 WL 5109132, at *11 (D. Mass. Sept. 19, 2016) (emphasis added) (citing Atl. Marine Const. Co. v. U.S. Dist. Court for W. Dist. of Texas, 134 S. Ct. 568, 581 (2013)). Here, Hernandez not only agreed to Massachusetts as the exclusive forum, he expressly waived in the Agreement his right to challenge the Massachusetts forum as inconvenient. "Venue for all such suits, proceedings and other actions will be in Massachusetts. Employee hereby waives any claims against or objections to such in personam jurisdiction and venue." §6.3 (A113).

Contractual waivers are enforceable unless they are procured through fraud or overreaching. See Chase Commercial Corp. v. Owen, 32 Mass. App. Ct. 248 (1992) (enforcing contractual jury waiver in standardized contract). Essentially for the same reasons that the choice of law and forum selection clause are not

unconscionable, there is no basis to ignore Hernandez' express waiver. Hernandez's waiver is in clear and conspicuous language. Id. at 253. The circumstances of Oxford's hiring Hernandez did not involve exploitation or gross inequity; it was an arms-length business decision by Hernandez. As noted, it is clear that Hernandez reviewed the Agreement. His checking off the box representing to Oxford that he was not under any contractual employment constraints demonstrates his awareness of the Agreement's terms and his knowledge of the importance Oxford placed on those terms. There is no basis in equity to relieve Hernandez of his waiver.

In sum, as there is no ground to relieve Hernandez of his waiver to any objection to personal jurisdiction or venue in Massachusetts, the waiver must stand and Hernandez' motion to dismiss on the basis of forum non conveniens rejected as a matter of law.

E. Hernandez cannot meet his "substantial burden" to prove that litigation in Massachusetts "will be so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court."

Even assuming arguendo that Hernandez is not precluded as a matter of law from seeking to dismiss

on the basis of forum non conveniens, the typical analysis applicable in the absence of a forum selection clause is altered by the parties agreement on forum. Where, as here, a forum selection clause exists, the Supreme Court has instructed that a "court accordingly must deem the private-interest factors to weigh entirely in favor of the preselected forum." Atl. Marine Const. Co. v. U.S. Dist. Court for W. Dist. of Texas, 134 S. Ct. 568, 582 (2013); see also, Kurra, 2016 WL 5109132, at *11 (declining to consider private interests of party opposing forum selection clause he expressly agreed to). This is so because "whatever inconvenience the parties would suffer by being forced to litigate in the contractual forum as they agreed to do was clearly foreseeable at the time of contracting." Atl. Marine Const. Co., 134 S. Ct. at 582 (citations omitted). The practical result of a forum selection clause being present in a forum non conveniens analysis is that the forum selection clause "should control except in unusual cases." Id.

There is nothing unfair or unreasonable to Hernandez in this case. Hernandez should not be allowed to grossly violate the restrictive covenants to which he agreed, and then - when called to task in

the forum to which he agreed - to attempt to argue and plead that he will be so burdened by the Massachusetts forum that he will effective lose his day in court. The private factors, as noted, should be disregarded in weighing whether substantial justice requires dismissal.

Moreover, the public interests weigh in favor of Oxford. Certainly, contrary to the lower court's determination that Massachusetts has little interest in the outcome of the case, Massachusetts has a substantial interest in ensuring that Oxford's rights under a Massachusetts contract are enforced according to the parties' agreement. Oxford is headquartered in Massachusetts and has chosen to have its rights vis-à-vis its employees governed by Massachusetts law in a Massachusetts forum. Hernandez agreed as a condition of employment to application of Massachusetts law and Massachusetts forum. Nothing in the public interest allowed the court to abrogate the express terms of Oxford's agreements with Hernandez upon Hernandez' claim now that Massachusetts is an inconvenient forum.

Obviously, Hernandez' deliberate decision to violate his restrictive covenants has consequences and he should not be relieved of his agreement to account

in Massachusetts for his intentional violations of the Agreement. Indeed, Hernandez' unlawful conduct came after Oxford sent him the April 11, 2016 letter, reminding him of his obligation to delete all confidential information and, among other things, not to use the company's trade secret information. (A94). The April 11 letter attached another copy of the Agreement.

In sum, where Hernandez agreed to Massachusetts law and a Massachusetts forum, submitted to jurisdiction, and waived any right to contest venue, he must be precluded from dismissing Oxford's case on forum non conveniens grounds. The court's Decision is arbitrary, relies on improper fact-finding and unreasonable inferences and contains fundamental errors of law that go to the heart of Oxford's claims and rights. Reversal is required. As the Agreement is not ambiguous, its interpretation is a legal ruling subject to plenary review. Baby Furniture Warehouse Store, Inc. v. Muebles D&F Ltee, 75 Mass. App. Ct. 27, 29 (2009)(interpretation of unambiguous contract constitutes a ruling of law subject to plenary review on appeal). Similarly, as noted, whether the Agreement is unconscionable is a legal ruling which in this

case, under the plain language of the Agreement and undisputed facts this court, can be made by this Court on review.

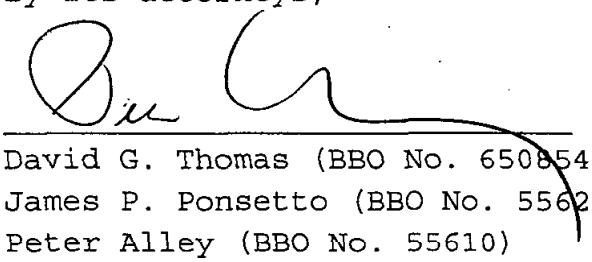
V. CONCLUSION

For the reasons herein, Oxford requests that the Court reverse the judgment of the court, vacate the Decision, and direct that judgment be entered in Oxford's favor denying Hernandez's motion to dismiss.

Respectfully submitted,

OXFORD GLOBAL RESOURCES, LLC,

By its attorneys,



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CERTIFICATE OF RULE 16(k) COMPLIANCE

I Peter Alley, hereby certify that the foregoing Brief of Plaintiff-Appellant complies with the rules of court that pertain to the filing of appellate briefs, including, but not limited to, Mass. R.A.P. 16(a)(6), 16(e), 16(f), 16(h), 18, and 20.

Peter Alley

NOTIFY

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT.
1684CV03911-BLS2

Notice sent
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D. G. T.
G. T.
J. V.
J. P. P.
B. S. S.
P. S.
L.M. S.

OXFORD GLOBAL RESOURCES, LLC

v.

JEREMY HERNANDEZ

MEMORANDUM AND ORDER ALLOWING DEFENDANT'S MOTION TO DISMISS ON *FORUM NON CONVENIENS* GROUNDS

(sc) Oxford Global Resources, LLC, is a recruiting and staffing company that places individual contractors who have specialized technical expertise with businesses who need workers having such skills. Oxford hired Jeremy Hernandez to work in its Campbell, California, office. To accept Oxford's offer Hernandez had to and did sign an offer letter and a separate "protective covenants agreement" (the "Agreement") that contains confidentiality, non-competition, and non-solicitation provisions. The Agreement provides that it is governed by Massachusetts law and that any suit arising from or relating to that contract must be brought in Massachusetts.

Oxford alleges that Hernandez breached the Agreement by using information regarding the identity of Oxford's customers to solicit those customers on behalf of a competitor in California. Hernandez has moved to dismiss this action under the *forum non conveniens* doctrine, arguing that this action should be heard in California, where he lives and worked for Oxford.

The Court concludes that the forum selection clause is unenforceable and that the interests of justice require that this case be heard in California. The Court will therefore ALLOW the motion to dismiss pursuant to G.L. c. 223A, § 5, and the common law doctrine known as *forum non conveniens*.

1. Enforceability of the Forum Selection Clause.

1.1. California Law Governs the Agreement. Whether Massachusetts courts will enforce a forum selection clause like the one agreed to by Hernandez must be decided under whatever law governs the contract as a whole. See *Melia* v. *Zenhire, Inc.*, 462 Mass. 164, 168 (2012); *Jacobson* v. *Mailboxes Etc. U.S.A., Inc.*, 419 Mass. 572, 575 (1995). Thus, before deciding whether the Agreement's mandatory forum selection clause is enforceable the Court must decide which State's law governs this

contract.[1] Although the Agreement specifies that it is governed by Massachusetts law, the Court concludes that choice-of-law provision is unenforceable and that the contract is instead governed by California law.

"A choice-of-law clause should not be upheld where," as here, "the party resisting it did not have a meaningful choice at the time of negotiation — i.e., where the parties had unequal bargaining power, and the party now attempting to enforce the choice-of-law clause essentially forced the clause upon the weaker party," and enforcing the clause would be unfair to the weaker party. *Taylor* v. *Eastern Connection Operating, Inc.*, 465 Mass. 191, 195 n.8 (2013). This follows from the general rule that contracts of adhesion are not enforceable if "they are unconscionable, offend public policy, or are shown to be unfair in the particular circumstances." *McInnes* v. *LPL Fin., LLC*, 466 Mass. 256, 266 (2013), quoting *Chase Commercial Corp.* v. *Owen*, 32 Mass. App. Ct. 248, 253 (1992); accord *Sonic-Calabasas A, Inc.* v. *Moreno*, 311 P.3d 184, 202-203 (Cal. 2013). As the American Law Institute has explained:

> A choice-of-law provision, like any other contractual provision, will not be given effect if the consent of one of the parties to its inclusion in the contract was obtained by improper means, such as by misrepresentation, duress, or undue influence, or by mistake. Whether such consent was in fact obtained by improper means or by mistake will be determined by the forum in accordance with its own legal principles. A factor which the forum may consider is whether the choice-of-law provision is contained in an "adhesion" contract, namely one

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[1] The Court concludes and the parties seem to agree that the provision stating that the Agreement will be governed by Massachusetts law and that all actions relating to or arising out of the Agreement "will be submitted" to a court in Massachusetts is a mandatory forum selection clause that requires such contract claims to be tried in Massachusetts. Although the contract does not expressly state that jurisdiction in Massachusetts is exclusive or that such suits may not be brought elsewhere, the combination of the "will be submitted" language with a choice of law clause stating that Massachusetts law shall govern the contract has the effect of making Massachusetts the "mandatory and exclusive" venue. See *Baby Furniture Warehouse Store, Inc.*, v. *Meubles D & F Ltée*, 75 Mass. App. Ct. 27, 31 (2009) (provision stating that contract is governed by Quebec law and that parties "agree to submit themselves to the jurisdiction of" Quebec courts for resolution of any disputes arising out of contract or parties' relationship gave Quebec courts "exclusive jurisdiction over any disputes between the parties"); accord *Boland* v. *George S. May Intern. Co.*, 81 Mass. App. Ct. 817, 826 n.12 (2012) (dictum).

> that is drafted unilaterally by the dominant party and then presented on a "take-it-or-leave-it" basis to the weaker party who has no real opportunity to bargain about its terms. Such contracts are usually prepared in printed form, and frequently at least some of their provisions are in extremely small print. Common examples are tickets of various kinds and insurance policies. Choice-of-law provisions contained in such contracts are usually respected. Nevertheless, the forum will scrutinize such contracts with care and will refuse to apply any choice-of-law provision they may contain if to do so would result in substantial injustice to the adherent.

Restatement (Second) of Conflict of Laws § 187 comment b (1971) (emphasis added).

It is apparent that the Agreement is a contract of adhesion and that Hernandez had neither the opportunity nor the bargaining power to negotiate over whether California or Massachusetts law would govern his non-competition, non-solicitation, and confidentiality agreements. The complaint specifically alleges that Oxford would not have hired Hernandez if he did not sign the Agreement, which makes clear that Hernandez had no opportunity to negotiate these issues. Oxford has neither alleged nor proffered any evidence suggesting that the parties had any negotiation over the choice of law or forum selection provisions contained in § 6.3 of the Agreement, or even that Oxford expressed any willingness to discuss those issues. The complaint also reveals that Hernandez had no bargaining power with respect to these issues. The complaint and its attachments indicate that Hernandez was hired to work as an entry-level employee. Oxford agreed to pay Hernandez $50,000 per year to work as an "account manager," and alleges that Hernandez "had no previous experience or skill in the information technology staffing and consulting industry." The only fair inference from the facts alleged by Oxford in its complaint is that Hernandez had no power to bargain over the combined choice-of-law and forum selection provision.

Oxford notes that § 7.5 of the Agreement states that Hernandez, by signing the contract, acknowledged that he had the opportunity to read the Agreement and to ask his own lawyer to review it, that he understood each provision, and that he was not under duress. But that boilerplate language cannot change the apparent facts that Hernandez had no bargaining power with respect to the choice-of-law and forum selection clauses in Oxford's standard form contract, and that the Agreement signed by Hernandez was not the product of any negotiations between the parties.

It is also apparent that the choice-of-law provision was an attempt by Oxford to circumvent California's strong public policy against the enforceability of non-competition agreement. If the Agreement did not contain a choice of law provision, then California law would govern Oxford's claims under the Agreement because California "has the most significant relationship to the transaction and the parties." *Bushkin Associates, Inc.* v. *Raytheon Co.*, 393 Mass. 622, 632 (1985); accord, e.g., *Nile* v. *Nile*, 432 Mass. 390, 401 (2000); *OneBeacon America Ins. Co.* v. *Narragansett Elec. Co.*, 90 Mass. App. Ct. 123, 128 (2016). It is undisputed that Hernandez was a California resident who was recruited and hired by Oxford in California, to work in Oxford's California office, and to service only California clients. Although Oxford says its principal place of business is in Massachusetts, Oxford has alleged no facts and presented no evidence suggesting that Hernandez's contract with and work for Oxford implicated Massachusetts in any way.

Non-competition agreements like the one that Oxford required Hernandez to sign are not enforceable under California law. See Cal. Bus. & Prof. Code § 16600 ("every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void"). This statute codifies "California's strong public policy against noncompetition agreements." *Advanced Bionics Corp.* v. *Medtronic, Inc.*, 59 P.3d 231, 236-237 (Cal. 2002). Even before the passage of § 1660, "it has long been the public policy of [California] that '[a] former employee has the right to engage in a competitive business for himself and to enter into competition with his former employer, even for the business of ... his former employer, provided such competition is fairly and legally conducted.' " *Reeves* v. *Hanlon*, 95 P.3d 513, 517 (Cal. 2004), quoting *Continental Car-Na-Var Corp.* v. *Moseley*, 148 P.2d 9, 13 (Cal. 1944).

Oxford's argument that the Agreement does not violate California law, because it only bars Hernandez from competing by using confidential information that belongs to Oxford, is without merit. The Agreement provides that Hernandez may not compete against his former employer using Oxford's trade secret information, but it defines the concept of confidential information so broadly that it includes the "identity" of Oxford's customers, prospective customers, and consultants. And the

complaint alleges that Hernandez breached the Agreement merely by soliciting companies and individuals that he knew where customers of or consultants placed by Oxford. The non-competition restriction that Oxford seeks to enforce therefore goes far beyond what is permitted under California law or, for that matter, under Massachusetts law.

An employee is free to carry away his own memory of customers' names, needs, and habits and use that information, even to serve or to solicit business from those very customers. Such "remembered information" is not confidential because the information itself, as distinguished from an employer's compilation of such information into a list or database, is known to the customers and thus not kept secret by the employer. *American Window Cleaning Co. of Springfield, Mass.* v. *Cohen*, 343 Mass. 195, 199 (1961); accord *Angell Elevator Lock Co.* v. *Manning*, 348 Mass. 623, 625 (1965); *Woolley's Laundry*, 304 Mass. at 391-392; *May* v. *Angoff*, 272 Mass. 317, 320 (1930). The same is true under California law. See *Retirement Group* v. *Galante*, 176 Cal.App.4th 1226, 1239-1241, 98 Cal.Rptr.3d 585, 594-596 (Cal. App. Ct. 2009).

Since the mere identity of customers is not confidential, the Agreement that Oxford seeks to enforce is the kind of non-competition agreement that is void under California law. *Dowell* v. *Biosense Webster, Inc.*, 179 Cal.App.4th 564, 577-579, 102 Cal.Rptr.3d 1, 11-12 (Cal. App. Ct. 2009); *Galante, supra.*

In sum, the Agreement's choice-of-law provision is not enforceable because it would result in substantial injustice to Hernandez by depriving him of the freedom to compete against Oxford in California that is guaranteed under California law, and it would do so based solely on a contract clause that Hernandez had no meaningful opportunity to negotiate when he was hired. See *Taylor*, 465 Mass. at 195 n.8. For the reasons discussed above, the Agreement is therefore governed by California law.

1.2. The Forum Selection Clause is Not Enforceable. The mandatory forum selection clause is unenforceable for much the same reasons.

Forum selection clauses are generally enforceable under California law "in the absence of a showing that enforcement of such a clause would be unreasonable." *Smith, Valentino & Smith, Inc.* v. *Superior Court*, 551 P.2d 1206, 1209 (Cal. 1976). The mere fact that such a clause was part of a contract of adhesion, rather than the

result of meaningful negotiation between the parties, does not render the provision unenforceable under California law. See *Cal-State Business Prods. & Servs., inc.* v. *Ricoh*, 12 Cal.App.4th 1666, 1679-1681; 16 Cal.Rptr.2d 417, 425-426 (Cal. Ct. App. 1993). "A mandatory forum selection clause ... is generally given effect unless enforcement would be unreasonable or unfair," even if it is made part of an employment agreement. *Verdugo* v. *Alliantgroup, L.P.*, 237 Cal.App.4th 141, 147, 187 Cal.Rptr.3d 613, 618 (Cal. Ct. App. 2015).

However, where a forum selection clause is combined with a choice-of-law provision that would bar a claim or defense in violation of California public policy, the forum selection provision is also "unenforceable as against public policy." See *Verdugo*, 237 Cal.App.4th at 154-157, 187 Cal.Rptr.3d at 624-625; accord *Hall* v. *Superior Court*, 150 Cal.App.3d 411, 413, 197 Cal.Rptr. 757, 759 (Cal. Ct. App. 1983).[2]

Since Oxford was hiring Hernandez to work for it in California, the evident reason why Oxford sought to make the Agreement subject to Massachusetts law and require that any lawsuits arising from the contract be brought in Massachusetts was that Oxford wanted to keep Hernandez from enforcing his rights under California law not to be subject to a broad non-competition agreement that barred any solicitation of Oxford's former or prospective customers. Under these circumstances, the forum selection clause in the Agreement is not enforceable under California law.

2. Analysis of Proper Venue. In the absence of an enforceable forum selection clause, a plaintiff's decision to bring suit in a permissible venue should be respected unless an adequate alternative forum is available and the relevant private and public interests strongly favor litigating the case elsewhere. *Gianocostas* v. *Interface Group-Massachusetts, Inc.*, 450 Mass. 715, 723 (2008). "In general terms, the doctrine of

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[2] These holdings by the California courts are not idiosyncratic. For example, the United States Supreme Court has noted with respect to mandatory arbitration clauses that "in the event the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations, we would have little hesitation in condemning the agreement as against public policy." *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 n.19 (1985); see also *M/S Bremen* v. *Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972) ("A contractual choice-of-forum clause should be held unenforceable if enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision.") (dictum).

forum non conveniens provides that, 'where in a broad sense the ends of justice strongly indicate that the controversy may be more suitably tried elsewhere, then jurisdiction should be declined and the parties relegated to relief to be sought in another forum.' " *Id.*, quoting *Universal Adjustment Corp.* v. *Midland Bank, Ltd.*, 281 Mass. 303, 313 (1933). Thus, "dismissal may be appropriate '[w]hen the court finds that in the interest of substantial justice the action should be heard in another forum.' " *Id.*, quoting G.L. c. 223A, § 5. "Decisions to grant or deny motions to dismiss on the ground of forum non conveniens are left to the discretion of the trial judge." *Id.*

The Court concludes, in the exercise of its discretion, that it would be unfair to compel Hernandez to defend himself in Massachusetts and that justice would best be served by dismissing this action so it may be tried in California.

State courts in California provide an adequate alternative forum. They are just as capable of hearing this matter and deciding it fairly. Oxford does not contest this point. The choice-of-law issues discussed above have no bearing on whether this case should be tried in Massachusetts or California. Cf. *Melia*, 462 Mass. at 173-182. Thus, the Court's determination that California law bars or at least limits Oxford's contract claims is irrelevant when deciding Hernandez's motion to dismiss on grounds of forum non conveniens. If California law applies and limits Oxford's claims, that will be true whether this matter is tried in California or Massachusetts courts.

In weighing the relevant private and public interests, the Court must take into account the fact that all relevant events occurred in California and all of Oxford's alleged harm or injury was incurred there. The Court credits Hernandez's unchallenged testimony (by way of affidavit) that he interviewed for the Oxford job in California, signed the offer letter and Agreement in California, was trained by Oxford in California, did all of his work for Oxford in California, and reported to Oxford supervisors who were located in California. The Court also finds that all of the Oxford clients (which are the companies that hire Oxford to recruit and place technically skilled personnel) and consultants (who are the people Oxford places with its clients) with whom Hernandez worked were located in California. The Court further finds that Hernandez still lives and works in California, that all of the individuals whom Oxford accuses Hernandez of soliciting for his new employer are

located in California, and that none of the conduct that Oxford accuses Hernandez of engaging in took place in Massachusetts or anywhere else outside of California.

As a result, the relevant private interests weigh heavily in favor of litigating this case in California. Since everything relevant to this case happened in California, it appears that all relevant witnesses are located in California and cannot be compelled to testify in Massachusetts. All other relevant evidence is presumably either located in California or available electronically so that it has no bearing on which forum is more convenient. It will be easier and more efficient for both Hernandez and Oxford to try this case in California. Indeed, Hernandez will be unable adequately to defend himself unless the case is litigated in California. And if Oxford were to obtain a judgment against Hernandez it would be much easier to enforce it if issued by a California court. The private interests strongly favor trial in California. Cf. *Gianocostas*, 450 Mass. at 726-727.

With respect to the relevant public interests, California has a much stronger interest than Massachusetts in deciding whether Hernandez breached his contract or committed a tort in trying to convince some of Oxford's customers or consultants in California to use a competitor instead. Hernandez has been a California resident since before he first started working for Oxford in California. And the business operations that Oxford claims were unlawfully harmed are located in California and serve California customers. Massachusetts has very little interest in the outcome of this lawsuit. Thus, the public interests also strongly favor trial in California.

For all of these reasons, the Court concludes that California is the appropriate forum in which to litigate Oxford's claims against Hernandez.

ORDER

Defendant's motion to dismiss this action on grounds of *forum non conveniens* is ALLOWED. Final judgment shall enter dismissing all claims without prejudice.

June 9, 2017

Kenneth W. Salinger
Justice of the Superior Court

State of California

BUSINESS AND PROFESSIONS CODE

Section 16600

16600. Except as provided in this chapter, every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void.

(Added by Stats. 1941, Ch. 526.)

Part III COURTS, JUDICIAL OFFICERS AND PROCEEDINGS IN CIVIL CASES

Title II ACTIONS AND PROCEEDINGS THEREIN

Chapter 223A JURISDICTION OF COURTS OF THE COMMONWEALTH OVER PERSONS IN OTHER STATES AND COUNTRIES

Section 5 FORUM NON CONVENIENS

Section 5. When the court finds that in the interest of substantial justice the action should be heard in another forum, the court may stay or dismiss the action in whole or in part on any conditions that may be just.

AD11